

FILED

JUL 10 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

(S)

No. 271234

84187-0

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

KITTITAS COUNTY, a political subdivision of the State of
Washington, BUILDING INDUSTRY ASSOCIATION OF
WASHINGTON (BIAW), CENTRAL WASHINGTON HOME
BUILDERS (CWHBA), MITCHELL WILLIAMS, d/b/a MF
WILLIAMS CONSTRUCTION CO., TENAWAY RIDGE,
LLC, KITTITAS COUNTY FARM BUREAU, and SON VIDA
II,

Petitioners,

v.

KITTITAS COUNTY CONSERVATION, RIDGE,
FUTUREWISE, and EASTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD,

Respondents.

**AMERICAN FOREST LAND COMPANY'S RESPONSE
TO MOTION FOR DIRECT REVIEW**

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ORIGINAL

I. INTRODUCTION

Intervenor-Petitioner American Forest Land Company ("AFLC") respectfully submits this memorandum in response to the request of Futurewise et al. ("Futurewise") for direct review. Direct review is not warranted where it is sought by the respondents simply to avoid what they perceive to be an unfavorable forum. Having briefed and argued the stay motion before the Kittitas County Superior Court, and having received an adverse ruling, Futurewise only now seeks to escape further consideration of the case by the superior court. Respondents have already submitted to the trial court's review and should not be permitted to shop for a more receptive forum under the guise of presenting issues of urgent statewide significance.¹ Moreover, the superior court has already grappled with the extensive administrative record and the legal issues in the case and has pledged to review the merits on an expedited basis. It should be permitted to do so now.

¹ Under RAP 6.3, this Court may grant direct review of a final decision of an administrative agency as provided in RCW 34.05.518. That is, this Court may grant review if it finds that "delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest and either: (i) Fundamental and urgent statewide or regional issues are raised; or (ii) The proceeding is likely to have significant precedential value." *Id.* AFLC joins the arguments presented in Kittitas County's response brief, which address Futurewise's failure to satisfy these statutory criteria for obtaining direct review.

II. DISCUSSION

A. The Kittitas County Superior Court should be permitted to complete its review of this case on the merits.

This is not a case in which direct review is needed to prevent a case from languishing in the superior court. The trial court has, *sua sponte*, accelerated its review of the matter. Futurewise Motion, Ex. B-9. The court has demonstrated this willingness to expedite the case by hearing oral argument on the motion to stay the Growth Management Hearings Board's ("Board") decision a mere 30 days after the Board entered its decision. *Id.* at B-2.

In hearing this case, the trial court has already familiarized itself with the record. In granting the motion to stay, the superior court carefully considered the evidence in the administrative record and provided a thorough analysis: "Nor does the statistical analysis presented by Futurewise necessarily support the proposition [that] parcels of five acres or less, because they may be smaller than the statistical average small farm, are therefore urban. Such a conclusion has no basis in fact." *Id.* at B-5. In evaluating whether Futurewise was likely to prevail on the merits, the trial court fully analyzed the "County's written record" in order to determine whether the County had complied with its obligations under the Growth Management Act. *Id.* at B-6.

Direct review is not warranted here precisely because the trial court has fully familiarized itself with the record below and has already assured the parties of a “prompt determination,” as contemplated by the direct review provision in RCW 34.05.518(3)(b).

B. The Superior Court properly recognized that Futurewise will not be harmed by any minor delay.

The trial court expressly recognized that any alleged harm to Futurewise from issuance of a stay order would be offset by “adequate safeguards set forth in the development regulations to protect the health, safety, and welfare of the public pending final resolution of these matters.”

Futurewise Motion, Ex. B-9. The trial court’s reasoning applies equally in the context of any slight delay that might result from allowing the trial court’s review of the matter to proceed. All of the harm alleged by Futurewise is entirely speculative, without any concrete demonstration of any specific harm that would result to a member of Futurewise.

C. Futurewise is the respondent in this appeal.

In its motion, Futurewise seeks to change the forum for appellate review of the Growth Management Hearings Board to this Court. Futurewise is not, however, the petitioner. If this Court decides to grant Futurewise’s motion for direct review, AFLC respectfully seeks this Court’s clarification

that the order of briefing and argument will proceed as if Kittitas County and the other petitioners had sought review with this Court in the first instance.²

Respectfully submitted this 9th day of July, 2008.

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² To the extent Futurewise affirmatively seeks discretionary review of the trial court's order granting a stay, such review must first satisfy the much narrower grounds for review set forth in RAP 2.3, under which discretionary review is plainly disfavored. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002).

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CERTIFICATE OF SERVICE

Jessica Hottell certifies and states:

I am a citizen of the United States of America and a resident of the
State of Washington; I am over the age of eighteen years; I am not a party to

this action; and I am competent to be a witness herein. On July 9, 2008, I caused to be served a true and correct copy of the following:

1. American Forest Land Company's Response to Motion for Direct Review; and
2. Certificate of Service.

via First Class Mail and Email upon the following:

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DATED at Seattle, Washington this 9th day of July, 2008.



Jessica Hottell